A

ASM METAL SDN BHD

v.

MALAYAN BANKING BHD

B

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
HELILIAH MOHD YUSOF JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: W-02-857-2009]

C

27 AUGUST 2010

BANKING: *Securities for advances - Guarantee - Scope of guarantee - Guarantee for revolving credit facility secured by third party charge over guarantor's land - Earlier separate corporate guarantee given by same*

D

guarantor to secure repayment of overdraft facility - Borrower defaulting in repayment of both facilities - Whether lender may claim under the charge for amounts owing under earlier corporate guarantee

LAND LAW: *Charge - Order for sale - Cause to the contrary - Form 16D claiming sums exceeding actual sum owed and payable by borrower - Form*

E

16D invalid - Cause to the contrary established - National Land Code, 1956 s. 256(3)

At the request of the appellant and Kai Peng Berhad ("the borrower"), The Pacific Bank Berhad ("PBB") granted a revolving

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credit facility to the borrower secured by a third party charge ("the charge") granted over a piece of land ('the property') by the appellant in favour of PBB. Under a vesting order, all assets and liabilities of PBB, including the revolving credit facility and the charge, were vested in the respondent. Earlier, the borrower had

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executed a corporate guarantee ("the corporate guarantee") in favour of the respondent to secure repayment of an overdraft facility granted by the respondent to Kai Peng Vessels Sdn Bhd. The borrower defaulted in the repayment of the revolving credit facility and the corporate guarantee. The respondent, pursuant to s. 254 of

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the National Land Code 1956 ('NLC'), served a notice in Form 16D on the appellant requiring the appellant to remedy the default. The appellant failed to remedy the default and the respondent took out an originating summons seeking an order for sale of the property. The appellant argued that the respondent was only entitled

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to claim under the charge the amount due by the borrower under the revolving credit facility and not the corporate guarantee. The learned Judicial Commissioner allowed the respondent's originating

summons on, *inter alia*, the grounds that: (i) cl. 7 of the annexure to the charge provided that the charge was intended to be a continuing security for all moneys owing to the respondent by the borrower and/or the appellant as principal or surety; and (ii) the appellant, after having agreed to the terms of the charge, was precluded from contending that the charge was only intended to secure the borrower's indebtedness under a revolving credit facility and not under the corporate guarantee. The appellant appealed against this decision.

Held (allowing the appeal with costs)
Per Hasan Lah JCA delivering the judgment of the court:

(1) There was nothing in the vesting order to say that the respondent could amalgamate their rights and the rights of PBB. The charge was to secure the loan given by PBB to the borrower. Clause 7 of the annexure to the charge must be viewed in that context. The charge was only to secure the revolving credit facility granted by PBB to the borrower. It was not the intention of the parties that the charge would cover the indebtedness of the borrower under the corporate guarantee. (para 22)

(2) The Form 16D issued by the respondent to the appellant was invalid because the respondent had combined the sums owing under the revolving credit facility and the overdraft facility. The sum mentioned in the statutory notice in Form 16D therefore exceeded the actual sum owed and payable by the borrower under the revolving credit facility. The appellant had shown cause to the contrary within s. 256(3) of the NLC to oppose the respondent's application for an order for sale of the property. (paras 23 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Atas permintaan perayu dan Kai Peng Berhad ('peminjam'), The Pacific Bank Berhad ("PBB") memberi kemudahan kredit pusingan kepada peminjam dijamin melalui gadaian pihak ketiga ('gadaian') yang diberi di atas sekeping tanah ('hartanah') oleh perayu dalam pihak PBB. Di bawah perintah letakhak, segala aset-aset dan liabiliti PBB, termasuk kemudahan kredit pusingan dan gadaian, terletakhak pada responden. Pada awalnya, peminjam telah melaksanakan gerenti korporat ('gerenti korporat') yang memihak kepada responden untuk menjaminkan bayaran balik kemudahan overdraf yang diberi oleh

A responden kepada Kai Peng Vessels Sdn Bhd. Peminjam gagal membayar balik kemudahan kredit pusingan dan gerenti korporat. Responden, di bawah s. 254 Kanun Tanah Negara ('KTN'), menyerahkan notis dalam Borang 16D ke atas perayu supaya perayu menyembuhkan kemungkiran. Perayu gagal menyembuhkan B kemungkiran dan responden mengeluarkan saman pemula untuk memperolehi perintah jualan hartanah. Perayu berhujah bahawa responden hanya berhak untuk memohon di bawah gadaian amaun yang perlu dibayar oleh peminjam di bawah kemudahan kredit pusingan dan bukan gerenti korporat. Pesuruhjaya Kehakiman telah C membenarkan saman pemula responden atas alasan-alasan, antara lain: (i) fasal 7 lampiran pada gadaian memperuntukkan bahawa gadaian bertujuan menjadi jaminan yang berterusan bagi segala wang yang dihutang kepada responden oleh peminjam dan/atau perayu sebagai prinsipal atau penjamin; dan (ii) perayu, selepas bersetuju D pada terma-terma gadaian, dihalang dari mempertikaikan bahawa gadaian hanya diniatkan untuk menjamin keterhutangan peminjam di bawah kemudahan kredit pusingan dan bukan di bawah gerenti korporat. Perayu telah merayu terhadap keputusan tersebut.

E **Diputuskan (membenarkan rayuan dengan kos)**
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Tidak terdapat apa-apa di dalam perintah letakhak untuk menyatakan bahawa responden boleh menggabungkan hak-hak mereka dan hak-hak PBB. Gadaian adalah untuk jaminan F pinjaman yang diberi oleh PBB kepada peminjam. Fasal 7 lampiran pada gadaian mesti dilihat dari segi konteks itu. Gadaian hanyalah untuk menjamin kemudahan kredit pusingan yang diberi oleh PBB kepada peminjam. Ia bukanlah tujuan pihak-pihak yang terlibat yang gadaian akan meliputi G keterhutangan peminjam di bawah gerenti korporat.

(2) Borang 16D yang dikeluarkan oleh responden kepada perayu adalah tidak sah kerana responden telah menggabungkan jumlah yang dihutang di bawah kemudahan kredit pusingan dan H kemudahan overderaf. Jumlah yang disebut di dalam notis statutori di dalam borang 16D telah melebihi jumlah sebenar yang dihutang dan sepatutnya dibayar oleh peminjam di bawah kemudahan kredit pusingan. Perayu telah menunjuk kausa sebaliknya di bawah s. 256(3) KTN untuk menentang I permohonan responden untuk perintah jualan hartanah.

Case(s) referred to:

Cambridge Credit Corporation Limited and Anor v. Lombard Australia Limited [1979] 136 CLJ 608 ***(refd)***

Co-operative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 HC ***(refd)***

James Pledge v. White and Others [1896] AC 187 ***(refd)***

Kawood Sdn Bhd v. HSBC Bank Malaysia Bhd & Ors [2001] 8 CLJ 363 HC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Re Tararone Investments Pty Ltd; Development Bank of Singapore Ltd v. Ong Yew Huat & Ors (Judicial managers of Tararone Investments Pty Ltd, jointly and severally) [2001] 4 SLR 167 ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 50

National Land Code, ss. 254, 256(3), 340

For the appellant - Kamaruzaman Arif; M/s Kamaruzaman Arif, Amran & Chong

For the respondent - Sean Yeow (Mong Chung Seng & Wong Weng Yew with him); M/s Lee Hishammuddin, Allen & Gledhill

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S5-24-2288-2007]

Reported by Amutha Suppayah

JUDGMENT

Hasan Lah JCA:

[1] This is an appeal by the appellant against the decision of the High Court given on 24 April 2009, allowing the respondent's application for an order for sale of the land held under H.S. (D) 72973, P.T. 3891, District of Petaling, Kuala Lumpur ("the property") pursuant to s. 256 of the National Land Code.

[2] On 13 October 2009 Mohd Hishamudin Yunus JCA and I had, by a majority, allowed the appeal at the conclusion of the submissions of counsel for the appellant and the respondent, (Heliliah Mohd Yusof JCA dissenting).

[3] We now give the grounds of the majority decision.

[4] The facts relevant to the appeal are as follows. At the request of the appellant and Kai Peng Berhad ("the borrrower") The Pacific Bank Berhad ("PBB") granted a revolving credit facility to the

borrower. Repayment of the revolving credit facility was secured by, *inter alia*, a third party charge ("the charge") dated 9 December 1999 over the property created by the appellant in favour of PBB.

[5] Under a vesting order dated 22 December 2000 made under s. 50 of the Banking and Financial Institutions Act 1989, all assets and liabilities of PBB, including the revolving credit facility and the charge, were vested in the respondent with effect from 1 January 2001.

[6] Earlier, the borrower had executed a corporate guarantee dated 9 August 1994 ("the corporate guarantee") in favour of the respondent to secure repayment of an overdraft facility granted by the respondent to Kai Peng Vessels Sdn Bhd.

[7] The borrower defaulted in the repayment of the amount due and owing under the revolving credit facility and the corporate guarantee. As at 31 May 2007 the amount due and owing by the borrower to the respondent was in the sum of RM831,567.16 consisting of RM289,836.42 for the revolving credit facility and RM541,730.74 for the corporate guarantee. By its solicitors' letter dated 7 June 2007, the respondent demanded from the appellant payment of the amount due and owing by the borrower under the revolving credit facility and the corporate guarantee. The appellant had failed, neglected and/or refused to pay the sum demanded.

[8] The respondent, pursuant to s. 254 of the National Land Code and through its solicitors, served a notice in Form 16D dated 23 August 2007 on the appellant, requiring the appellant to remedy the default under the charge within seven days from the date of the notice. The appellant failed, neglected and/or refused to remedy the default.

[9] On 2 October 2007 the respondent took out an originating summons to seek an order for sale of the property, which was granted by the High Court.

[10] In the High Court, the appellant resisted the respondent's originating summons solely on one ground, that is, the respondent is only entitled to claim under the charge the amount due by the borrower under the revolving credit facility. It was the contention of the appellant that at the time the charge was created, it was never the intention of the appellant to be held responsible for the indebtedness of the borrower under the corporate guarantee. The appellant further submitted that the respondent had breached its

statutory or contractual obligation when it failed to accede to the appellants request to redeem the charge by payment of the sum due under the revolving credit facility only.

[11] In the written grounds of judgment of the learned judicial commissioner she allowed the respondent's originating summons on, *inter alia*, the following grounds:

(a) Clause 7 of the annexure to the charge provides that the charge is intended to be a continuing security for all moneys owing to the respondent by the borrower and/or the appellant as principal or surety,

(b) The appellant, after having agreed to the terms of the charge, is precluded from contending that the charge was only intended to secure the borrower's indebtedness under a revolving credit facility, and not a borrower's indebtedness under the corporate guarantee.

[12] Before us, learned counsel for the appellant submitted on one main issue, that is, whether the respondent may amalgamate both the revolving credit facility and the overdraft facility and make the appellant liable to the respondent under the terms of the charge for the indebtedness of the borrower under the corporate guarantee. The appellant took the position that it is only liable under the terms of the charge in relation to the revolving credit facility and not in relation to the overdraft facility. It is the appellant's contention that Form 16D dated 23 August 2007 issued by the respondent is defective because the respondent had combined the amounts due under the two facilities. As a result of the defective and invalid notice, there was therefore in existence a cause to the contrary under s. 256(3) of the National Land Code. In support of his contention learned counsel for the appellant cited the case of *Co-operative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467.

[13] With regard to the terms of the charge learned counsel for the appellant submitted that the liability of the appellant under cl. 1 of the annexure to the charge is restricted to facility granted to the borrower by PBB. As such the appellant cannot be made liable for the amount owed by the borrower under the overdraft facility.

[14] It was further submitted that the liability under cl. 7 of the annexure to the charge must be given a similar restriction. The security created by the charge must also be restricted to the facility granted by PBB.

[15] In response, learned counsel for the respondent submitted that the terms of the charge, especially cls. 7, 36 and 62 of the annexure to the charge, clearly provide for the respondent's right to claim from the appellant, the amount due and owing by the borrower under the two facilities. The rights of PBB under the terms of the charge were vested in the respondent by the vesting order where it provides, *inter alia*, that:

> Where any right or liability of Pacific Bank is transferred to Maybank, Maybank shall have the same rights, powers and remedies ... as if it had at all times been a right or liability of Maybank ... .

[16] Learned counsel for the respondent further submitted that pursuant to cl. 7 of the annexure to the charge the respondent was entitled to claim from the appellant not only the amount due under the revolving credit facility but also the amount due under the corporate guarantee. In support of his submission learned counsel cited the following cases:

(a) *Cambridge Credit Corporation Limited and Anor v. Lombard Australia Limited* [1979] 136 CLJ 608;

(b) *Kawood Sdn Bhd v. HSBC Bank Malaysia Bhd & Ors* [2001] 8 CLJ 363;

(c) *Re Tararone Investments Pty Ltd; Development Bank of Singapore Ltd v. Ong Yew Huat & Ors (Judicial managers of Tararone Investments Pty Ltd, jointly and severally)* [2001] 4 SLR 167;

(d) *James Pledge v. White and Others* [1896] AC 187.

[17] It is also the contention of learned counsel for the respondent that since the charge was intended to be a continuing security, the respondent was entitled to claim from the appellant, the borrower's debt under the corporate guarantee.

[18] Clause 7 of the annexure to the charge provides:

> 7. The security hereby created is expressly intended to and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the

> Chargor(s) and/or the Borrower(s) whether alone or jointly and severally with another or others and whether as principal or surety notwithstanding that the Chargor(s) and/or the Borrower(s) may at any time or times cease to be indebted to the Bank to any period or periods and notwithstanding that the account or accounts of the Borrower(s) with the Bank may from any cause whatsoever cease to be a current account or accounts and notwithstanding any settlement of account or accounts or otherwise.

[19] In *Cambridge Credit Corporation Limited* a registered bill of mortgage over certain land in Queensland secured repayment of moneys lent by the mortgagee to the mortgagor. At the time the mortgage was given the mortgagor had a contingent liability as guarantor to the mortgagee of loans that the mortgagee had made to companies associated with the mortgagor. The mortgagor became liable under the guarantee during the subsistence of the mortgage. The bill of mortgage charged the lands with the principal advanced by the mortgagee and interest thereon and "all such further and other sums of money ... as are now or hereafter shall become due or payable owing ... upon any account whatsoever ..."

The High Court of Australia held, *inter alia*, that the charging words of the mortgage extended to liabilities which were contingent at the date of its execution and ceased to be contingent during its subsistence. Hence the amount due under the guarantee was charged as a sum which had become due, owing or payable.

[20] In *Re Tararone Investments Pte Ltd* Sogo Department Stores (S) Pte Ltd, an associate company of Tararone, was indebted to DBS to the tune of $18m in an overdraft account in March 1998. DBS informed Sogo that they would be willing to continue granting Sogo overdraft facility of up to $18m, subject to Sogo progressively reducing the overdraft outstanding in according with a repayment schedule, and a security, in the form of a charge in respect of a $18m fixed deposit to be placed by Tararone with DBS.

Under cl 1 of the charge, the charge was expressly stated to be in respect of 'advances, loans, credit and/or other banking facilities or accommodation' given to Sogo, all of which facilities were collectively referred to as 'the banking facilities'. Under this clause, Tararone covenanted to pay to DBS, on demand all sums of money owing by Sogo in respect of those banking facilities. Clause 6 further reaffirmed that notwithstanding the other provisions, the

charge 'shall be and remain a continuing security for all moneys and liabilities from time to time owing by Sogo to DBS in respect of the banking facilities'.

The High Court of Singapore ruled that the charge was only to secure the $18m overdraft debt which Sogo owed to DBS at the time the charge was created and that the phrase 'all moneys and liabilities which may be owing to the Bank from time to time' appearing in the facility letter related to ancillary debts such as interests and costs arising under the facility. The High Court was of the view that while the wording of the charge seemed to be wide, the clauses therein must be read together to determine the parties' intention.

On appeal, the Court of Appeal of Singapore held that this charge is a charge in respect of all moneys from any account which are owed by Sogo to DBS. While the original reason for the creation of the charge was the $18m overdraft facility which DBS had then granted to Sogo, and which DBS were prepared to continue to extend to Sogo, the express terms of the charge clearly go beyond that. Nowhere is it stated, nor can it be implied, that the charge merely secures the payment of the overdraft facility.

[21] In *James Pledge* the House of Lords held that where the owner of different properties mortgages them to different persons and the mortgages afterwards become united in title, the holder of the mortgages has a right to consolidate them, and to refuse to be redeemed as to one without payment of what is due to him on all, not only as against the mortgagor but also as against a person to whom the mortgagor has by one deed assigned the equity of redemption of all the properties, although the assignment is made before the mortgages become united in title.

[22] In our view the cases mentioned above can be distinguished on the ground that the loans were made by one bank only. There is nothing in the vesting order to say that the respondent may amalgamate their rights and the rights of PBB. In the instant case the charge was to secure the loan given by PBB to the borrower. As such we are of the view that cl. 7 of the annexure to the charge must be viewed in that context. Even though the wording of cl. 7 seems to be wide the charge in our view was only to secure the revolving credit facility granted by PBB to the borrower. It was not the intention of the parties that the charge would cover the

indebtedness of the borrower under the corporate guarantee given by the borrower in favour of the respondent in respect of the overdraft facility granted by the respondent five years earlier to Kai Peng Vessels Sdn. Bhd.

[23] We agree with the submission of the learned counsel for the appellant that the Form 16D dated 23 August 2007 issued by the respondent to the appellant is invalid and ineffective because the respondent had combined the sums owing under the revolving credit facility and the overdraft facility. The sum mentioned in the statutory notice in Form 16D therefore exceeded the actual sum owed and payable by the borrower under the revolving credit facility. In *Co-operative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 Lim Beng Choon J made the following observation at pp. 475-476:

> Under the circumstances I am impelled to hold that the wrongful demand for payment of the default interest to which the plaintiff bank is not entitled must necessarily render the notice of demand and the Form 16D ineffectual and invalid. It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff bank had no right.

[24] In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 the Supreme Court held that cause to the contrary within s. 256(3) of the National Land Code may be established only in three categories of cases, namely:

(a) a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the Code;

(b) a chargor who is able to show that the chargee has failed to meet the conditions precedent for making of an application for order for sale;

(c) a chargor who is able to demonstrate that its grant would be contrary to some rule of law or equity.

With regard to the second category the Supreme Court, through Gopal Sri Ram JCA, said at pp. 45 and 46:

> Secondly, a chargor may show cause to the contrary within s. 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the

A chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See, *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

[25] In the circumstances of the whole case and for the above reasons we came to the conclusion that the appellant had shown cause to the contrary within s. 256(3) of the National Land Code to oppose the respondent's application for an order for sale of the property. We therefore allowed the appeal with costs and the orders made by the High Court were set aside.